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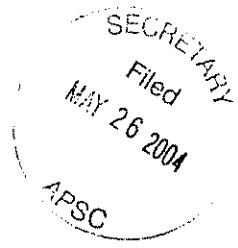
May 26, 2004



VIA HAND DELIVERY

Walter Thomas, Secretary
Alabama Public Service Commission
100 N. Union Street – 8th Floor
RSA Union Building
Montgomery, AL 36104

Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996 - Docket No. 28841

Dear Mr. Thomas:

Enclosed are the original and ten (10) copies of *BellSouth Telecommunications, Inc.'s Exceptions to Recommendations of Arbitration Panel.* Please distribute as needed and return a stamped copy of the cover letter to my office in the envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

Francis B. Semmes

FBS/mhs
Enclosures

cc: Honorable John Garner, ALJ (via hand delivery)
Honorable Mark Montiel, Esq. (via overnight mail)
Honorable Terry Butts, Esq. (via overnight mail)
Honorable James E. Wilson, Esq. (via overnight mail)
Mr. Darrell Baker, Director (via hand delivery)
Mr. Larry Smith, Supervisor (via hand delivery)
Parties of Record

5/26/2004
Copy to
Comm
A.S.
Legal
Terry Butts
Jim Wilson
Mark Montiel

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996	)	Docket No. 28841
	)	
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	)	
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BELLSOUTH'S EXCEPTIONS
TO RECOMMENDATIONS OF ARBITRATION PANEL

BellSouth Telecommunications, Inc. ("BellSouth"), a party to the above-captioned arbitration, pursuant to Rule T-26(I)(2), submits its exceptions to the arbitration panel's report and recommendation ("Recommendation").

I. Background

The Alabama Public Service Commission ("Commission") directed the arbitration panel ("Panel") to submit a report and recommendation on "open issues" in interconnection negotiations between BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom"). The arbitration was to be conducted pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act"). The parties successfully negotiated the bulk of the issues, including closing some during the pendency of the arbitration.[1] BellSouth submits the following exceptions to the Recommendation. By separate filing, BellSouth will address the comments filed on Issue 25 in accordance with the Commission's Notice in this matter dated May 5, 2004.

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[1] Indeed, the parties recently successfully negotiated a resolution to the language that they will include in the interconnection agreement on issues 59 (payment due dates) and 60 (deposits). Because these two issues are no longer "open," the Commission need not review that portion of the Recommendation. See §252(b)(4)(C) (State commission shall conclude the resolution of any "unresolved" issue).

II. Exceptions to Panel Recommendation

A. Overview

BellSouth respectfully submits that the Panel Recommendation suffers from a number of legal and factual errors. They include:

A. The Recommendation impermissibly permits DeltaCom to adopt, opt into, or "pick and choose" terms of other companies' interconnection agreements, even though the agreements chosen by DeltaCom do not exist or have termination provisions that the Panel deleted from the terms of the adoption. These impermissible adoptions violate or allow DeltaCom to evade, among other things, §§252(b)(4)(a) and 252(i) of the Act and Rule T-26(G)(4) of this Commission's Rules, as well as a controlling Federal Communications Commission ("FCC") decision.

B. The Recommendation violates various FCC and Commission decisions and policies, as well as and federal and state law. The Recommendation:

- Decided issues that are not "requirements" of §252 of the Act, in violation of §251(c)(1) of the Act and directly contrary to Commission Rule T-26(I)(1); instead, it applied a "technically feasible and not prohibited by the Act" standard urged by DeltaCom but found nowhere in the Act;
- Ignored both controlling and persuasive FCC and Commission decisions and, while relying on other State commission decisions that are favorable to DeltaCom's position, failed to rely on decisions (even from the same orders that held against BellSouth) that support BellSouth's position;
- Ignored other applicable legal standards; and

- Improperly overrode Commission-approved processes, guidelines, and issue resolution procedures, particularly the industry-wide Change Control Process ("CCP");

C. Ignored uncontroverted testimony and relied on "facts" that were not in the record;

D. Impermissibly overrode state law and the Commission's Telephone Rules; and

E. Violated basic principles of due process.

BellSouth acknowledges that the Commission has discretion in the areas that the Legislature has granted it authority. That latitude, however, is not without limits, and it is constrained both by state law and federal law. BellSouth believes that the Panel, for some reason or reasons, was not mindful of those limits. BellSouth respectfully requests that the Commission reject the unlawful or factually infirm aspects of the Panel's Recommendation, which are outlined below.

B. Specific Exceptions [2]

BellSouth assigns in detail the following exceptions:

Issue 2: Directory Listings

This issue involves the method that DeltaCom uses to view directory listings that are to appear in the telephone book. DeltaCom wants electronic access to BellSouth's non-regulated directory publishing company's (BellSouth Advertising and Publishing Company's, or

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[2] For purposes of a potential appeal, BellSouth does not intend, by limiting its detailed discussion herein to certain issues, to waive the arguments and positions that it provided to the Panel in its Post-Hearing and Reply Briefs. Indeed, BellSouth still maintains that the Panel fundamentally misunderstood and pervasively misapplied the terms of Section 252 of the Act, in that it failed to arbitrate issues to "meet the *requirements* of Section 251. . ." 47 U.S.C. §251(c)(1) (emphasis supplied) and Commission Rule T-26(I)(1) (same). BellSouth thus assigns, as a legal exception, all issues that DeltaCom "wanted" but are not *requirements* of Section 251. BellSouth also specifically incorporates by reference as an exception, on the grounds mentioned in its Post-Hearing and Reply Briefs, each issue that it presented to the Panel but does not discuss here, including issues 11(a) (compliance with state law); 56 (cancellation charges); and 64 (ADUF) (in which the Panel reached its conclusion a) without any evidentiary support for DeltaCom's claim that it is being supplied with ADUF records improperly and that BellSouth's systems are "flawed" [Tr. 1111-12], and b) ignoring the Georgia Public Service Commission's ("Ga. PSC's") contrary finding. Georgia PSC Order dated January 14, 2003, Docket No. 1653-U ("Ga. DeltaCom Order"), pp.18-19.).

"BAPCO's") database, despite the fact that DeltaCom can (and does) proofread paper galley pages today and has electronic access to BellSouth's directory assistance database. DeltaCom further wishes to adopt the language of the AT&T/BellSouth interconnection agreement, to include the rates and terms negotiated therein.

The Panel recommended: a) that BellSouth provide DeltaCom the same rates, terms, and conditions that it provides to AT&T; b) that BellSouth provide DeltaCom an electronic copy of the directory listing information pursuant to a "reasonable cost-based rate;" and c) that BellSouth allow DeltaCom the ability to review and edit "its own customers' directory listings."

The Panel erred legally as follows:

1) AT&T did not have an interconnection agreement with BellSouth into which DeltaCom (or any other CLEC) could opt or from which they could "pick and choose," even if that were legally permissible. The AT&T/BellSouth agreement that DeltaCom attempted to adopt has expired, so there was no Commission-approved agreement into which DeltaCom could opt. DeltaCom's witness agreed with that fact, something that the Panel ignored. See Hearing Transcript ("Tr.") 1012-1013. The Panel erred by recommending that which is not legally permitted.[3]

2) The Panel's analysis and conclusion are inconsistent with, and expressly violate, both the FCC's and this Commission's decisions and federal law.

(a) This issue is not a proper subject of a §252 arbitration because it has nothing to do with non-discriminatory access to directory listings. It relates, instead, to directory

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[3] The Panel and the Commission are limited by the Act and by Commission rule to considering the issues (here, the adoption of the AT&T language) presented in the arbitration petition and responses thereto. See §252(b)(4)(A) of the Act and Rule T-26(G)(4) of the Commission's Telephone Rules. The Panel disregarded these authorities by choosing to ignore that DeltaCom, in its petition for arbitration, specifically sought to adopt the AT&T language. See Issues Matrix that follows the Panel's Recommendation. The Panel cannot simply order BellSouth to incorporate the "same terms and conditions" as are contained in the AT&T Agreement, as opposed to the specific language, to evade the effect of Act and the Rule. Such an end-run would render the opt-in provision of the Act a virtual nullity.

publishing. Determination of a method of access for proofreading a directory to be published, as opposed to providing discriminatory access to directory listings, is not a requirement of §251 of the Act. (Indeed, both this Commission and the FCC found in their respective 271 Orders that BellSouth provides CLECs with nondiscriminatory access to BellSouth's directory assistance database.) DeltaCom has electronic access to BellSouth's directory assistance database, and the DeltaCom witness testified that, "To the best of my knowledge, the law does not specify the means that you have to give [access to directory listings] to me." Tr. 1017-1018. Thus, the Panel completely disregarded both the law and the testimony on this issue.

(b) Furthermore, and perhaps more troubling, is the fact that the Panel completely disregarded this Commission's prior ruling on the subject of directory publishing. In the 1997 AT&T Order,[4] the Commission stated:

> We are of the opinion that the [Telecommunications Act of 1996] does not address telephone directory services and this is not a proper matter of this arbitration proceeding. Directory publishing is a matter that should be negotiated between AT&T and BAPCO.

1997 AT&T Order, p. 24. This issue is only over the subject of proofreading for paper publishing; it has nothing to do with nondiscriminatory access to directory assistance or directory listing services. The Panel has, for some reason, totally ignored the Commission's prior ruling that dealings between CLECs and BAPCO are not proper matters for a Section 252 arbitration

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[4] Arbitration Report in the Form of a Proposed Order, *In the Matter of the Arbitration Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.*, Docket No. 25703 (February 6, 1997), approved by Order of the Commission, February 6, 1997 ("1997 AT&T Order"). See also Rule T-26(I)(1), which requires that the resolution and conditions recommended by a panel "meet the *requirements* of Section 251 [of the Act]"

proceeding.[5] Such an about-face would certainly put into question the integrity, fairness, and validity of the arbitration and approval process.

c) The panel ordered BellSouth (not BAPCO, which is the company that has galley proofs) to provide access to a BAPCO system. Requiring BAPCO to provide anything in connection with this arbitration would violate BAPCO's due process rights, as it is not a party hereto. Furthermore, the Panel recommended that BellSouth do so at "a reasonable cost-based rate." DeltaCom did not, as required by Commission Rule T-26(A)(2)(d), submit with its petition any proposed prices for this new service. The Panel, thus, is inviting the Commission to err by disregarding its own rules.[6]

The Panel factually erred as follows, by arbitrarily and capriciously disregarding the evidence:

1) The testimony was **uncontroverted** that BellSouth does not have the technical and systems capabilities to provide an electronic feed of directory listings for DeltaCom customers. Tr. 1448 and 1018. Furthermore, the technology does not currently exist to permit BellSouth to segregate DeltaCom's listings from those of other CLECs. Tr. 1024-1025. Yet the Panel ordered BellSouth to do what it is not capable of doing.

2) DeltaCom's testimony was that this is a DeltaCom "resource issue" only, not one of a requirement of the Act or one of necessity. Tr. 1023. Thus, the Panel is attempting to

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[5] Though it cited the March 2, 2004 North Carolina Utilities Commission ("NCUC") order in support of its own position (see Recommendation, p. 7), the Panel failed to note that the Georgia PSC, like this Commission in the 1997 AT&T arbitration, found that it had no jurisdiction to entertain this issue. See Ga. DeltaCom Order, at p. 2.

[6] Rule T-26(I)(1). See Tr. 1027 (DeltaCom did not include pricing as an issue.) If the Panel intended, rather than to require BellSouth to give DeltaCom an "electronic feed," for DeltaCom to receive listings in an electronic format to alleviate its concerns about reviewing paper copies of listings one at a time, BellSouth is willing to negotiate, for a just and reasonable rate, a method by which DeltaCom can receive listings in an electronic format. The Public Staff of the North Carolina Utilities Commission recently recommended to the NCUC that it clarify its Order so that DeltaCom can receive its listings in an electronic format, as opposed to an "electronic feed." Comments of the Public Staff, Docket No. P-500, Sub 18 (NCUC), filed May 17, 2004, at p. 3. BellSouth is willing to do this despite the fact that it is outside the parameters of this arbitration.

engage in a naked transfer of wealth from BellSouth to DeltaCom without even attempting to ground the requirement in statutory terms, which it cannot do in any event. This is also an issue whereby the Panel may effectively have given DeltaCom an unfair competitive advantage vis-à-vis its competitors. Factually, then, as well as legally, this is not a position that the Commission should endorse.

3) The North Carolina Utilities Commission's order,[7] relied upon by the Panel, is similarly infirm, as that commission presumed that galley proofs exist in electronic form (Recommendation, p. 6); BellSouth is aware of nothing in the record of this case on that issue. Furthermore, the Commission does not have the authority to order BAPCO, an entity separate from BellSouth and one that is not regulated by the Commission, to transfer its systems capabilities to BellSouth (assuming, of course, such a transfer were physically possible or feasible, also a matter that appears nowhere in the record of this case) in order to implement the Recommendation. Finally, the Panel seemingly ignored the fact that DeltaCom *already has the ability to review and edit its own customers' directory listings*. Tr. 1030.

For these reasons, the Panel's recommendation on Issue 2 is both legally and factually unsupportable.

Issue 9: OSS Interface

This issue, as framed by DeltaCom, deals with whether BellSouth should be required to provide interfaces to its operational support systems ("OSS") "which have functions equal to that provided by BellSouth to BellSouth's retail division. . . ." Recommendation, p. 13. Although DeltaCom's witness agreed with BellSouth on the applicable legal standard—"nondiscriminatory access" to OSS—DeltaCom insists on ambiguous contract language ("Systems may differ, but

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[7] BellSouth has filed exceptions to the North Carolina Order, and it is hopeful that the NCUC will revise that portion of the arbitration order that deals with BAPCO.

all functions will be at parity") that is nowhere mentioned in the Act and admittedly is "something different from" the discriminatory access standard. Tr. 1056.

The Panel erred legally by: 1) imposing a legal standard ("to provide OSS interfaces with the same functionalities as those provided to BellSouth's retail division. . .") that is different from that required by the Act—"nondiscriminatory access" to *information* in BellSouth's OSS;[8] 2) by ignoring the fact (with which DeltaCom agrees—Tr. 1055, 1284-85) that both the FCC and this Commission in their 271 Orders have affirmatively found that BellSouth *already* provides nondiscriminatory access to its OSS;[9] and 3) by ignoring the Commission's policy and past practice that industry-wide issues regarding changes to BellSouth's OSS (which, by definition, apply to all CLECs) are appropriately referred to the Change Control Process ("CCP") and are not proper subjects for a two-party arbitration. See Order dated July 11, 2002, Docket No. 25835, at pp. 168-170. Any "functionality" change, like any industry-affecting change, should be submitted to the CCP for consideration and ranking.

The Panel erred factually by: a) imposing a finite limitation (". . . with the exception . . . [of] BellSouth's developed market or customer profiling data") that BellSouth had cited *by way of example only*. Indeed, the Panel directly acknowledged that BellSouth's position was that functions "*such as* credit information or customer profiling" were legally off-limits. Yet, in its two-and-one-half line analysis of this issue (Recommendation, p. 12), the Panel simply ignored the nature of the testimony; and b) by requiring the parties to adopt ambiguous language, which

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[8] The Georgia PSC agreed with BellSouth that it is access to *information necessary to perform the functions* that is the requirement. Ga. DeltaCom Order, p. 4. The Panel erroneously confuses the word "functionalities" for the FCC's word "functions." The FCC requires that BellSouth must provide access to its OSS so that that the "functions" of pre-ordering, ordering, provisioning, billing, and maintenance and repair can be performed. "Functionalities" is a much broader, and ambiguous, term. The Commission should correct this error.

[9] Furthermore, BellSouth's continued compliance with the Act's non-discriminatory access to OSS requirements is ensured by the performance measurements that this Commission has adopted in Docket No. 25835

neither apparently understands, in lieu of a known statutory definition, to address an OSS functionality problem (if it is one) that should be addressed regionally though the CCP.

Issue 21: Dark Fiber Access

This issue—does BellSouth have to make available to DeltaCom dark fiber loops and transport at any technically feasible point?—is purely a legal one that hinges on FCC definitions and the Act's requirements with regard to unbundled network elements ("UNEs").

The Panel erred legally by a) once again ignoring the issue as framed by the arbitration petition, and b) by improperly ignoring the FCC's definition of a UNE and creating its own "new UNE" without even attempting to engage in the "impairment analysis" that is required by the Act for the establishment of a UNE. The Panel's Recommendation is thus inconsistent with, and expressly violates, federal law.

a) The parties presented the issue for resolution by the Commission as follows: "Does BellSouth have to make available to DeltaCom dark fiber *loops* and *transport* at any technically feasible point?" See Issues Matrix, Issue 21; Recommendation, p. 16 (emphasis supplied). In resolving this issue, however, the Panel ruled that, "... BellSouth should be required to allow ITC to access unused dark fiber *facilities* at any technically feasible point in BellSouth's network...." (Recommendation, p. 27) (emphasis supplied). The Commission should (and must, in order to prevent reversible error) clarify that the term "dark fiber facilities" as used in the Arbitration Order was referring to dark fiber *loops* and dark fiber *transport* and was not intended to create a new dark fiber unbundled network element apart from loops and transport.

Without such a clarification, the Order would be inconsistent with Section 252(b) of the Act, which sets forth certain requirements on state commissions when arbitrating issues under the 1996 Act, and Rule T-26(G)(4), which essentially mirrors the requirement of §252. Of

particular importance to this case is Section 252(b)(4)(A), which provides that "[t]he State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." By use of the word "*shall,*" the Act prohibits the Commission from modifying the issue actually presented in the petition and response which, in this instance, was limited to DeltaCom's access to dark fiber *loops* and dark fiber *transport,* not unused dark fiber "*facilities.*" Any expansion of the issue to include non-loop and non-transport dark fiber elements (i.e., "*unused dark fiber facilities*") would violate Section 252(b)(4)(A) and Rule T-26(G)(4).

b) Clarification that the Recommendation is limited to dark fiber loops and dark fiber transport is also warranted in light of the FCC's *Triennial Review Order.*[10] In that order, the FCC established the scope of unbundled dark fiber as it relates to dark fiber loops (¶¶311-314) and dark fiber transport (¶¶381-385). FCC Rule 51.319, which sets forth an incumbent's unbundling obligations, speaks only in terms of dark fiber loops and dark fiber transport. Nowhere does the FCC impose upon an incumbent the obligation to unbundle dark fiber in any manner that does not meet the definition of a loop or transport as defined by the FCC.[11]

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[10] Portions of the *Triennial Review Order* were recently vacated and remanded by the United States Court of Appeals for the D.C. Circuit. BellSouth addresses the impact of the D.C. Circuit Court's decision on dark fiber in the discussion at page 20, below.

[11] The FCC defines a loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." *Triennial Review Order*, at ¶ 197, n.620. The FCC has defined dedicated transport as "those transmission facilities connecting incumbent LEC switches and wire centers within a LATA." *Id.*, at ¶ 365.

The FCC considered and rejected the notion that transmission facilities not meeting the definition of transport[12] should be unbundled simply because (as DeltaCom argues, and the Panel held) it is "technically feasible" to do so:

> We note that a previous Commission reached a different finding that, because unbundling this type of transmission facility is "technically feasible" and "will reduce entry barriers into the local exchange market," it was appropriate to include such facilities within the definition of dedicated transport. We find that this approach was misguided. ***The standard for unbundling is not "technical feasibility" and, moreover, just because a facility is capable of being unbundled does not mean that it is appropriately considered to be a network element for purposes of section 251(c)(3).***

Triennial Review Order ¶ 366 (footnotes omitted) (emphasis supplied). Thus, to the extent dark fiber is defined beyond a dark fiber loop or dark fiber transport based on "technical feasibility," such an approach would be inconsistent with and directly violative of the FCC's reasoning. Such a broad definition of dark fiber also would conflict with the FCC's prohibition against incumbents having to construct point-to-point facilities for CLECs. *Id.*, ¶ 645.

Importantly, DeltaCom has an alternative for obtaining any point-to-point (non-transport and non-loop) dark fiber facilities that it may require. As noted in BellSouth's Post-Hearing Brief, "[t]o the extent DeltaCom seeks dark fiber segments that run between customer locations or between other locations not defined as either loops or transport under the FCC's definitions, BellSouth has a tariff offering to accommodate DeltaCom's needs." (BellSouth Post-Hearing Brief, at 28.) The referenced tariff is BellSouth's Dry Fiber Tariff (FCC Tariff No. 1, §§ 7.2.10 and 7.5.13). *Accord*, Tennessee Regulatory Authority, Transcript of Deliberative Proceedings ("TRA Proceeding"), January 12, 2004, at pages 8-9 (rejecting DeltaCom's position); see

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[12] The transmission facilities cited as the example were transmission links that simply connect a competing carrier's network to the incumbent's network. These types of transmission facilities would certainly fall into the category of dark fiber links (i.e., non-transport dark fiber) that could be requested under an overly broad interpretation of the Panel's recommendation regarding dark fiber.

Comments of NCUC Public Staff, filed May 17, 2004, at p. 4 (suggesting that the NCUC reconsider its order and substitute the phrase "loops and transport" for the word "facilities.")

In the event DeltaCom wanted the creation of a new dark fiber unbundled network element, it should have raised the issue in its arbitration petition and presented evidence sufficient for the Panel to make the necessary findings under the FCC's "necessary and impair" standard, assuming (without conceding) that the Commission may permissibly order such a thing. DeltaCom failed to raise the issue or present proof. Accordingly, the Commission should clarify that the term "dark fiber" as used in the Arbitration Order was referring to dark fiber loops and transport only, and was not intended to create a new dark fiber unbundled network element.

Issues 44 and 46: Operator Services

These issues involve whether BellSouth should be required, by means of an arbitration decision on a *wholesale* interconnection agreement, to provide *retail* services to its own customers that it does not provide today. The Panel has recommended that the parties "develop mutually acceptable language . . . that provides customers of each company to obtain [busy line verification/busy line verification and interrupt ("BLV/BLVI")] on lines assigned to subscribers of other companies at rates which are just and reasonable."

The Panel erred legally by: a) ordering a telephone utility, by means of an arbitration of a two-party *wholesale* interconnection agreement under 47 U.S.C. §252, to provide a *retail* service to its customers that it does not currently provide; b) by impermissibly ignoring Rule T-26(A)(2)(d), which requires the moving party to submit with its petition any proposed prices for

a new service;[13] c) by impermissibly treating BellSouth's retail services as UNEs, which they are not (and by virtue of that fact, are outside the parameters of a §252 arbitration), and even though the FCC has ruled that operator services are *not* UNEs; and d) by ignoring the fact that BellSouth has provided the necessary interconnection services to DeltaCom for it to provide BLV and BLVI to *its* customers, thus fulfilling its interconnection obligation under the Act. The Panel, thus, is inviting the Commission to err by disregarding the limitations of an arbitration under the Act and the Commission's own rules. This forum is simply (and as a matter of law) not a "free-for-all" for any and every item on a CLEC's "want list." See Rule T-26(I)(1) (arbitration panel must "ensure that the resolutions and conditions recommended meet the *requirements* of Section 251 [of the Act.])"

For reasons that it considers good and sufficient (including cost and efficiency considerations), BellSouth has chosen not to offer BLV/BLVI on CLEC lines to BellSouth's retail customers. DeltaCom has chosen, also for its own valid reasons, to offer those services to its retail customers, in part *using BellSouth's interconnection services and facilities*. It is unprecedented, however, for the Panel to recommend, under the guise of a §252 arbitration, that the Commission require one party to offer a new *retail* service to *its own customers*.[14] This is, after all, a case about a *wholesale* interconnection agreement, and the Commission's powers at

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[13] In the absence of the required material, there can be no lawful order on arbitration regarding a rate, and only "rates for interconnection services and network elements in accordance with Section 252(d) of the Act" may be recommended. Rule T-26(I)(1).

[14] There is no authority contained anywhere in §252 of the Act for either the FCC or this Commission to mandate that a carrier offer specific retail services. Furthermore, DeltaCom's witness was asked, "Do you agree that a company should make its own decisions about which products and services it wishes to offer its own customers?" His answer: "Yes." Tr. 783. The Panel completely disregarded this admission. The Panel thus committed both legal and factual error.

arbitration are circumscribed by the terms of the Act.[15] The Commission lacks any authority under the Act, which by design deals only with general interconnection duties between CLECs and incumbent local exchange carriers ("ILECs"), to mandate that either party offer retail services to its customers. In this regard, it is important for the Commission to recognize that DeltaCom does not even contest the fact that BellSouth has interconnected with DeltaCom in such a manner as to allow DeltaCom to provide BLV/BLVI to its customers and that BellSouth will actually perform a BLV/BLVI on BellSouth lines when requested by DeltaCom, thus fulfilling its interconnection duties under the Act.[16]

The Panel factually erred, as well. While the Commission may very well wish to inquire as to whether the public might be better off if BLV/BLVI were required to be offered state-wide by all telephone companies, that is not a proper inquiry for a two-party arbitration. The Panel ignored the suggestion, adopted by the Georgia Public Service Commission (among others) and endorsed by DeltaCom (DeltaCom Post-Hearing Brief, p. 32), that this issue be considered in a separate industry-wide docket.[17] In a separate docket, more views and solutions to issues (such as the suitability and efficacy of currently available solutions such as caller ID

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[15] Indeed, the Recommendation is internally inconsistent, a fatal flaw. In its recommendation on Issue 11 (compliance with state law), the Panel acknowledges that the authority of the Commission over BellSouth, though "exclusive," "must also be exercised consistent with federal law." Recommendation, p. 16. This conclusion, while correct, is directly contrary to the recommendations on Issues 2, 21, 44, 46, 47, and 61, in which the Panel is improperly attempting to create new UNEs, ignoring the Act's requirements, and imposing other "state law" requirements that run counter to prior FCC rulings.

[16] The Panel's Recommendation is bad public policy and may set a dangerous precedent, as well. For example, if a CLEC can use a §252 arbitration to dictate to an ILEC which retail services it can offer, the corollary might be true—a CLEC could use a §252 arbitration to preclude an ILEC from offering a specific service. The Commission should not allow itself to be led down this path.

[17] Ga. DeltaCom Order, p. 13. The fact is, as established at the hearing, that not all operator services platforms in Alabama are interconnected, making it currently impossible for every subscriber in Alabama to do BLV and BLVI on every other customer. Tr. 779-780. The cost and tariff issues alone compel that this issue be explored, if at all, in a generic docket. The Panel's attempt to dictate which services will be offered at retail is also anti-competitive and could result in the cost of providing BLV/BLVI becoming so expensive that BellSouth is forced to raise those rates or discontinuing service altogether. The Panel's approach, though perhaps well-intended, is woefully misguided.

and call waiting features) than just DeltaCom's self-serving ones could be explored. In addition, the Panel seems to have ignored that fact that DeltaCom "does not know" whether it can, or will, perform these same functions for carriers to which it sells its own version of operator services! Tr. 778. BellSouth respectfully suggests, once again, that this issue be deferred to a forum where more views than one can be evaluated by an impartial fact-finder.

Issue 47: Reverse Collocation

On this issue, the Panel recommends that BellSouth be required to compensate DeltaCom, on the same terms and conditions that apply to DeltaCom's collocation in BellSouth's space, when BellSouth collocates in DeltaCom's collocation space.

The Panel erred legally by again ignoring the fact that this arbitration is conducted pursuant to §252 of the Act, which circumscribes the proper subjects of the arbitration. As BellSouth pointed out, the only collocation obligations in the Act are found at §251(c)(6), which addresses collocation obligations of ILECs, *not CLECs*. This issue, like many others decided by the Panel, is beyond the scope of a §252 arbitration. The Panel ignored BellSouth's legal argument, starting the discussion with, "Aside from the legal issue, . . ." (Recommendation, p. 45). It concluded that, "[W]hether DeltaCom has a duty to permit collocation of BellSouth equipment in its space is not the issue. The issue is reciprocity...." Recommendation, p. 46. BellSouth respectfully suggests that the Panel has committed manifest legal error by ignoring the controlling statute and inventing its own test, "reciprocity," something that it constructs out of whole cloth.

Issue 62: Limitation on Back-Billing

This issue deals with the time limitation on the parties' ability to back-bill the other for undercharges. From a practical standpoint, BellSouth buys a relatively minuscule amount of

service from DeltaCom, so this issue virtually has no effect on DeltaCom. It is, however, of great importance to BellSouth. Furthermore, DeltaCom's testimony is that this is not a customer-affecting issue. Tr. 495-502.

The evidence was that backbilling for services actually rendered by BellSouth for which DeltaCom was mistakenly undercharged was an inconvenience to DeltaCom for several reasons (Id.) But because of the complexity of modern telecommunications and BellSouth's billing systems, the proposed 90-day limitations period proposed by DeltaCom is simply not sufficient for BellSouth to retrieve data, records, and backup support. Tr. 1315. DeltaCom countered that several of BellSouth's (unnamed) "other vendors," whoever they may be and no matter how distinguishable those situations might be, have shorter backbilling periods in their voluntary supply contracts than BellSouth's proposal.

The Panel ordered that BellSouth be prohibited from issuing corrected bills for services *actually provided to and used by DeltaCom*, even if there is no dispute over the fact that the incorrect amount was billed, if DeltaCom can just get beyond a short 90-day limitations period.[18]

The Panel committed legal error: 1) by exempting DeltaCom from laws and rules that apply to every other company in the State of Alabama. The Commission should not, under the guise of supervisory authority over utilities, exempt DeltaCom from the operation of other statutory law, particularly a law in which the Legislature has set the public policy of the State. Every other person in the State of Alabama who enters into a contract is governed by the statute of limitation on actions, *Code of Alabama* §6-2-34(4), §6-2-34(9), or §6-2-37(1). The Legislature has laid down the general public policy that the Panel cannot change, especially in a two-party

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[18] Exceptions to this limitation would, unsurprisingly, be changes arising out of governmental mandates, regulatory actions, true-ups, or other similar proceedings, Recommendation at p. 64, situations where such a limitation would arguably not be enforceable.

arbitration; and 2) by ignoring, or re-writing with no evidence to back it up, the Telephone Rules of this Commission. **Rules T-5(C)(5) and (6) specifically address the situation of underbilling,** make no distinction between retail and wholesale customers, and limit underbilling (and overbilling) corrections to a 36-month maximum, perhaps not coincidentally the same period provided for in the general statute of limitations.[19] The Panel attempted to ground its conclusion with the vague statement that it was "convinced" that the Telephone Rules apply only to the retail setting. The "convincing," however, is neither legally nor factually supported by nor tied to anything in the record of this matter or in the public record.[20]

The Panel factually erred by concluding, without any evidentiary support, that this issue "may" impact retail customers. The testimony, however, was clear that it would *not* have an impact on customers. (Tr. 495) Thus, the Panel's conjecture is not supported factually. Second, 90 days was proposed by DeltaCom on the "factual" basis that it was what the "CFO and our senior management feels like [is] a reasonable benchmark." Tr. 490. A "feeling" is not a sufficient factual basis on which to override a statute and re-write a T-Rule. Furthermore, the Panel's "retail effect" justification (i.e., that DeltaCom's retail customers might be affected) is completely without merit, because, as the Panel conceded, the 36-month T-Rule already applies to retail customers. Recommendation, p. 63. It can't be both ways. The Panel is attempting, both directly and indirectly, to re-write the Telephone Rules—without any public or industry

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[19] The Panel apparently ignored the fact that the law of Alabama discourages forfeitures. See, e.g., *Noel Smith Dev. Co. Ltd. v. National Filtronics*, 360 So.2d 338, 340 (Ala. 1978). DeltaCom admitted that it would be on the receiving end of a post-90 day forfeiture. Tr. 501-502. The Panel also chose to rely on the significantly distinguishable existence of different backbilling periods for BellSouth's non-telecommunications vendors, but it then ignored the fact that DeltaCom may also enjoy differing treatment from its vendors. Tr. 450-451.

[20] In yet another internal inconsistency, the Panel attempts to draw a distinction between its power to effect whatever changes it desires in the wholesale setting (because, it concludes, it is granted virtually unlimited authority over intercarrier relations in an arbitration setting—Recommendation at p. 63), but it can ignore the corresponding retail setting. Contrast that with the Panel's recommendation that BellSouth be ordered to provide retail BLV/BLVI services, Recommendation at p. 43. The unfairness to BellSouth of this entire proceeding begins to add up.

input—a result that is palpably unfair and discriminatory as to every other person, carrier and non-carrier alike, in the State of Alabama who has entered into a contract.[21] This regulatory fiat would result in a windfall to DeltaCom—and every carrier that is able to take advantages of this new, unlegislated rule—who would not be required to pay for services that it actually received.[22] Finally, the new rule is not reciprocal, in that if BellSouth **overbills** DeltaCom, there is no indication that the newly-minted 90-day limitations period will apply. Surely this result is against public policy; in any event, it against all notions of fairness. See also Ga. DeltaCom Order, p. 18 (rejecting the proposed 90-day period).

Issue 63: Audits

The Panel recommends that, because of the complexity of BellSouth's billing and the "fact" that DeltaCom has no effective measure to ensure that BellSouth's billing is accurate, it should be able to enjoy the same rights to audit BellSouth's billing as does Sprint. Recommendation, pp. 65-71. (In yet another internal contradiction, compare the basis for this recommendation with Issue 62, where billing complexities do not justify a reasonable back billing period.) The Panel would require BellSouth to import the Sprint auditing language to the new interconnection agreement, but it specifically refused to incorporate the expiration language of the Sprint agreement into the auditing rights. Recommendation, p. 71.

The Panel committed legal error: 1) by ordering BellSouth to permit DeltaCom to adopt the Sprint "audit" language without also incorporating the expiration date of the Sprint

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[21] The "out" that the Panel would permit—an exception on a showing of good cause—does not include the very reason the T-Rule permits backbilling: a mistake on the part of the utility. The Panel has chosen to ignore the complexity of BellSouth's billing system in decreeing that BellSouth cannot rectify mistakes.

[22] It is literally unbelievable that, based on DeltaCom's internal policy that it will not backbill customers, the Panel would direct, despite the existence of the controlling statute and T-Rule, that BellSouth cannot be paid for services that it actually provided but mistakenly underbilled. See Tr. 496. This convoluted rule will increase BellSouth's cost of doing business, which means that DeltaCom's windfall will likely be spread as a future rate increase to other BellSouth customers, including BellSouth's wholesale customers other than DeltaCom.

language. The Panel's analysis and conclusion are inconsistent with, and expressly violate, the FCC's interpretation of the adoption provisions of §252(i) of the Act. One limitation on adoption, as set forth by the FCC, is that "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), *including its original expiration date.*" [23] Assuming that DeltaCom can adopt the requested language in the first place (which it cannot do--see discussion immediately below), it can do so only through the termination date of the Sprint/BellSouth agreement;[24] and 2) by treating "audits" as an "adoptable" element of an interconnection agreement in the first place. The Act does not permit adoption of anything that is not an "interconnection, service, or network element" provided by BellSouth. BellSouth does not provide audits as a service or network element; indeed, it is not licensed in Alabama to provide auditing services, and auditing is certainly not an interconnection service or network element.

The Panel committed factual error by erroneously concluding that there is no existing effective billing measure upon which DeltaCom can rely. The Panel completely ignored the record evidence that service quality measures, for which penalties follow in connection with the self-effectuating enforcement mechanisms adopted by the Commission, include billing accuracy. There is thus a factually incorrect premise from which this recommendation flows. In addition, the Panel ignored the fact that this Commission has extensively reviewed BellSouth's billing

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[23] Memorandum Opinion and Order, *In the Matter of Global NAPs South, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-181 (rel. August 5, 1999), at fn. 27 (emphasis supplied). See also *Order on Reconsideration*, Docket No. 16583-U (Ga. PSC, May 6, 2004), at p. 6 (clarifying that BellSouth's obligation under "pick and choose" only extends to the term of the agreement from which the language is adopted).

[24] DeltaCom wanted to adopt language from the *AT&T* agreement, not the *Sprint* agreement. DeltaCom candidly admitted that Sprint was not mentioned in any of the pleadings. Tr. 296; see Issues Matrix, Issue 63. The Panel's Recommendation once again improperly seeks to enable DeltaCom to make an end-run around Rule T-26(G)(4), T-26(F)(3), and the "opt-in" provision of §251(i) of the Act.

practices and procedures and found them to be non-discriminatory.

Issues 21, 36, 37, and 57: Triennial Review Order Issues

BellSouth excepts to the Panel's conclusions regarding Issues 21 (in addition to the reasons given above), 36, 37, and 57. Specifically, the Panel's reliance upon the *Triennial Review Order* has, through no fault of the Panel, proven to be premature.

As discussed above, Issue 21 deals with dark fiber. In addition to the arguments raised above, BellSouth proposes as an alternative resolution that the Commission simply defer ruling on this issue until there is more certainty in the law. As it stands today, the D.C. Circuit has vacated the FCC's conclusion that BellSouth's competitors are impaired without unlimited access to dark fiber transport. (Slip. Op. at 28) ("We therefore vacate the national impairment findings with respect to . . . dark fiber and remand to the Commission to implement a lawful scheme.") (The NCUC Public Staff has recommended that the NCUC amend its Order and adopt this approach. See Comments of NCUC Public Staff, filed May 17, 2004, at pp. 4-5.)

The Panel's conclusions regarding Issue 36 concern the co-mingling of UNEs and special access. Prior to the *Triennial Review Order*, the FCC prohibited such co-mingling.[25] In the *Triennial Review Order*, however, the FCC eliminated the prohibition on co-mingling pursuant to newly created "structural safeguards." BellSouth notes that the FCC's national impairment finding on switching (and in some instances, loops) was vacated by the D.C. Circuit's Order. Indeed, it may be that, after all is said and done, there may not be anything with which special access can be co-mingled. Because of this uncertainty, and the Panel's premature reliance on the *Triennial Review Order* in rendering a decision on this issue, the Commission should simply

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[25] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587, para. 28. (rel. June 2, 2000), at ¶28 ("Supplemental Order Clarification").

defer ruling on this issue or require the parties to apply the law as it existed prior to the *Triennial Review Order*.

The Panel's conclusions regarding Issues 37 and 57 concern the availability of enhanced extended links ("EELs"). The FCC's decisions in the *Triennial Review Order* regarding EELs were remanded by the D.C. Circuit to the FCC for re-evaluation. (Slip op. at 59) Because of the uncertainty in the law regarding EELs, and the Panel's premature reliance on the *Triennial Review Order* in rendering a decision on this issue, the Commission should simply defer ruling on this issue or direct DeltaCom to avail itself of, and pay for, the other options that are available to it.

Issues 6 and 67: Additional Issues that Should Be Deferred or Clarified

BellSouth is especially concerned about the integrity of the industry-wide CCP, to which this Commission has frequently deferred, but about which the Panel was apparently unconcerned. See Issues 6 and 67. DeltaCom is seeking, and the Panel has recommended, that DeltaCom be permitted to circumvent the orderly process by which all CLECs, not just one, submit changes that they wish to be made to BellSouth's OSS.

BellSouth discussed the CCP and the beneficial effects that an industry-wide process has on OSS changes. See BellSouth's Post-Hearing Brief at pages 9-11. The Commission itself has endorsed the CCP as the proper vehicle for addressing modifications to BellSouth's OSS. See Docket No. 25825, Order dated July 11, 2002, at pp. 168-170. In yet another inconsistency, the Panel followed this policy for Issue 66, but not for Issue 67. See Recommendation, pp. 73-75. It should have deferred all CCP issues to that process, not just Issue 66.

Issue 6 (facility check): BellSouth requests that the Commission note that the Georgia PSC sensibly deferred Issue 6 to its next Service Quality Measurements review because it

potentially affects BellSouth's performance under its SQM. Ga. DeltaCom Order, p. 3. The Commission should likewise defer this issue to Docket No. 25835, where a review of the current SQM and SEEM will be conducted. (It should be noted that the Commission requires BellSouth to apply the Georgia version of the SQM to its operations today, and DeltaCom has stated its own willingness to forego penalty payments for some period of time.) Thus, a deferral of this issue should not be a major concern. In the alternative, this issue should be referred to the CCP.

Issue 67: System outages. As the evidence showed,[26] DeltaCom blew up an incident in which it did not get its way in the CCP to one where the Panel legislates for the CCP. BellSouth does not have a conceptual problem with what the Panel recommends, i.e., that under normal circumstances, it will not shut down all OSS interfaces at the same time during normal business hours. The Panel recommends, however, that all interfaces should not be shut down except in case of emergency, but if BellSouth must shut them down simultaneously, it should notify DeltaCom of that fact ahead of time. The problem here, of course, is that one cannot predict emergencies and notify DeltaCom in advance of them. By ordering language that only in emergency situations will all OSS interfaces be down simultaneously, the Panel has not only usurped the role of every other member of the CCP, it has set an impossible bar—DeltaCom must be notified before a shutdown, apparently even in case of an emergency. The Panel's Recommendation places BellSouth in an untenable position. BellSouth requests that the Commission clarify this Issue along these lines—"BellSouth may not shut down all three

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[26] The Recommendation very curiously fails to inform the Commission, even in the most cursory way, of the facts surrounding this issue. BellSouth, after conducting discussions with CLEC representatives, acceded to the CLEC community's request to shut down its OSS completely for a period of time on the weekend between the Christmas and New Year holidays in 2002. The shutdown was to accommodate the installation of a new version of its systems, a "high priority" item for the CLEC community. DeltaCom alone objected. Because it didn't get its way, DeltaCom now asks the Panel to impose DeltaCom's view on the rest of the industry. The Panel has apparently accommodated DeltaCom's wish, despite the fact that this situation has not recurred in nearly a year and a half. See Tr. 1279, 1303-1306, and 1142-1147.

interfaces simultaneously unless: 1) there is an emergency that requires such action; *or* 2) BellSouth provides advance notification to DeltaCom according to CCP guidelines." In the alternative, it should defer this issue to the CCP, where it really belongs.[27]

The Panel has essentially determined that DeltaCom will be "more equal than others" by recommending that its CCP-implicated changes to BellSouth's support systems be placed at the top of the CCP modifications list as a "regulatory mandate," thus trumping and supplanting the CLEC community's rating of desired changes. The Commission should not permit DeltaCom, or any CLEC, to substitute its self-serving "want list" for the will of the CLEC community.[28]

If DeltaCom is aggrieved by the rankings of OSS changes by the CLEC community, it can challenge that industry-wide decision by using the established CCP appeal procedure, something that it has not elected to do. The Commission should maintain its salutary practice of requiring CCP issues to be decided in the CCP.

III. Conclusion

As discussed above, the Panel accepted DeltaCom's invitation to recommend relief irrespective of whether the Act obligates BellSouth to provide the things its wants; to recommend relief without concern for the impact on the rest of the industry; and to recommend relief for free, even if BellSouth incurs costs to provide it. Neither the Act, nor Alabama law, nor basic principles of fairness provide this Commission grounds to approve the above-mentioned items in the Recommendation. BellSouth should not be compelled to carry the business burdens that the Act does not compel and that DeltaCom has chosen not to bear itself.

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[27] Though the Panel did not note it, both the Georgia PSC and the Tennessee Regulatory Authority decided that issue 67 was also an issue that should be decided through the CPP, not via arbitration. Ga. DeltaCom Order, p. 19; TRA Proceeding, pp. 47-49; see also TRA Proceeding, pp. 6-7.

[28] If every CLEC successfully arbitrated its "pet" CCP issues, all such issues would go to the head of the line, which would completely eviscerate the utility of the CCP. This is a situation where, of necessity, individual desires, no matter how facially reasonable or apparently trivial, should not be allowed to subvert the industry-wide process that has been approved by the FCC and nine state commissions in BellSouth's region.

BellSouth thus requests that the Commission reject and modify the Recommendation, to the extent outlined above.

Respectfully submitted this 26th day of May, 2004.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing *BellSouth's Exceptions to the Recommendations of Arbitration Panel* on the parties of record, by depositing same in the United States Mail, postage prepaid on this the **26th** day of May, 2004.

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